



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Harley-Davidson, Inc.

**File:** B-238436.3

**Date:** June 4, 1990

William E. Hughes III, Esq., Whyte & Hirschboeck, for the protester.

John P. Carey, Esq., Paul, Hastings, Janofsky & Walker, for Hayes Diversified Technologies Corporation, an interested party.

W.D. Durrett, Jr., Esq., United States Marine Corps, for the agency.

Guy R. Pietrovito, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest concerning the responsiveness of the proposed awardee's bid is dismissed as untimely when filed more than 10 working days after the protester knew the basis of its protest allegation.

2. Protest allegation that proposed awardee cannot meet the solicitation requirements concerns the agency's affirmative determination of responsibility, which will not be reviewed by the General Accounting Office except in limited circumstances not present here.

### DECISION

Harley-Davidson, Inc., protests the proposed award of a contract to Hayes Diversified Technologies Corporation under invitation for bids (IFB) No. M67854-89-B-0035, issued by the United States Marine Corps, for motorcycles. Harley-Davidson contends that the bid of Hayes is nonresponsive and

048695/141541

that award must be made to Harley-Davidson as the only remaining, responsive bidder.<sup>1/</sup>

We dismiss the protest as untimely.

The IFB, issued November 14, 1989, contemplated the award of a contract for base and option quantities of motorcycles with various auxiliary equipment. Bidders were informed that the Corps would award a single, fixed-price contract as a result of the IFB and that bids would be evaluated by adding the total price of all options to the price for the base requirement.

Bid opening occurred on February 7, 1990, and the Corps received the following bids:

Ft. Walton Yamaha	\$1,513,052.40
Hayes	\$1,637,414.70
NOSA, Inc.	\$2,077,080.00
Armstrong	\$2,710,010.00
Harley-Davidson	\$2,776,295.30

The Corps found only Hayes to be responsive and proposed award to Hayes. On May 16, Harley-Davidson protested to our Office that Hayes' bid was nonresponsive.

The Corps requests that we summarily dismiss Harley-Davidson's protest as untimely because the protester failed to protest within 10 working days of the date it learned the basis of its protest. Harley-Davidson argues that it was not until May 2, at the bid protest conference on Armstrong's second protest (B-238436.2), that it learned that the Corps had found Hayes' bid to be responsive. The protester contends that its protest is timely since it was filed on May 16, within 10 working days of the protest conference.

---

<sup>1/</sup> Armstrong Motorcycles Limited has filed two protests with our Office (B-238436, B-238436.2) contesting the alleged restrictiveness of the IFB requirement that bidders furnish Environmental Protection Agency air emissions certificates of conformity with their bids and the responsiveness of Hayes' bid. The Corps in its report on Armstrong's second protest (B-238436.2) stated that only Hayes' bid was responsive.

Our Bid Protest Regulations require protests, other than those concerning apparent solicitation improprieties, to be filed within 10 working days of when the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1990). Here, we find that the protester failed to protest within 10 working days of the date on which it knew the basis of its protest.

The Corps states that Harley-Davidson received a copy of the agency's report on Armstrong Motorcycles Limited's second protest (B-238436.2) on April 26. The agency's report states that only Hayes' bid was found to be responsive. To be considered timely, Harley-Davidson was required to protest the responsiveness of Hayes' bid by May 10, within 10 working days of receiving the agency's report. Harley-Davidson's protest, filed May 16, is therefore untimely.<sup>2/</sup>

Harley-Davidson also argues that it first learned in the May 2 protest conference that the Corps would not be testing first articles to ensure that the awardee's motorcycle would satisfy the IFB cold temperature starting requirements and thus its protest allegation that Hayes cannot meet this requirement was timely filed. A bidder's apparent ability and capacity to perform all the contract requirements concerns a bidder's responsibility and not responsiveness, which concerns whether a bidder has unequivocally offered to perform services in conformance with all material terms and conditions of the IFB. See Sage Assocs. Gen. Contractors, Inc., B-235497, Aug. 15, 1989, 89-2 CPD ¶ 141. Here, Hayes unequivocally offered to provide a motorcycle which met all of the IFB requirements, including the cold temperature starting requirements. Harley-Davidson's objection, therefore, concerns the Corps' affirmative determination of Hayes' responsibility.

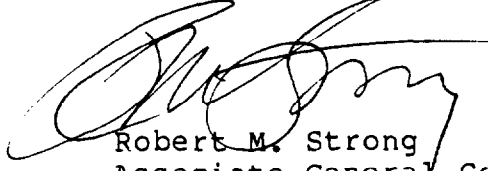
Our Office, however, will not review protests against affirmative determinations of responsibility unless either possible fraud or bad faith on the part of contracting officials is shown or the solicitation contains definitive responsibility criteria which allegedly have been misapplied. See Aero Technology Co., B-235277, July 7, 1989, 89-2 CPD ¶ 22. Harley-Davidson has not made such a

---

<sup>2/</sup> Harley-Davidson informed us on April 30 that it had a copy of the agency's report on Armstrong's second protest (B-238436.2). Even assuming that April 30 is the date on which Harley-Davidson first learned the basis of its protest, Harley-Davidson's May 16 protest was not timely filed.

showing here. Furthermore, whether Hayes actually performs in compliance with the requirements is a matter of contract administration, which is the responsibility of the contracting agency and is not reviewable under our bid protest function. 4 C.F.R. § 21.3(m)(1); Vacco Indus., B-230036, Apr. 21, 1988, 88-1 CPD ¶ 393.

The protest is dismissed.

A handwritten signature in black ink, appearing to read 'Robert M. Strong', is written over the printed name.

Robert M. Strong  
Associate General Counsel